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In the Supreme Court

of the United States

OCTOBER TERM 1965

No. 465

TILLAMOOK COUNTY CREAMERY ASSOCIATION,

Petitioner,

v.

TILLAMOOK CHEESE & DAIRY ASSOCIATION,

Respondent.

REPLY BRIEF OF PETITIONER

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-65

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Central to the Petition is the conflict in principle between a long line of prior trademark decisions and the present one which leaves the public and trademark rights in a state of confusion. Respondent asserts (Br. p. 12) that *Saxlehner* v. *Eisner* 1900, 179 U.S. 19; *French Republic* v. *Saratoga* 1903, 191 U.S. 427; and *Castner* v. *Coffman* 1900, 178 U.S. 168, show that there is no conflict. Examination of the facts of those cases does not support the argument that this Court has approved of a trademark situation which leads to serious demonstrable public confusion.

That there is serious confusion between petitioner's and respondent's products as stated in the Petition is more than confirmed by recent events which are a matter of public record, and born out by the documents hereto appended.

When respondent (TC&DA) first left petitioner (TCCA), respondent did not call its cheese "Tillamook Cheese" but used a "Premium Brand" label in which the word "Tillamook" was prominent. Now, however, emboldened by the lower courts' decisions, respondent has entered into a trademark licensing agreement with one of the giants of the dairy industry*—Foremost Dairies, Inc.—to market respondent's (TC&DA's) cheese under the "Tillamook" trademark. See appendices A and B attached hereto, which are articles that appeared in the September 3, and 24, 1965 issues of The Oregon Journal.

Other occurrences which have taken place since the decision of the court of appeals, and raised by respondent's counsel's threats of contempt proceedings against petitioner's distributor in the Los Angeles area, Chris Brandt, further confirm the confusion between the products of the parties.

There are attached hereto, as appendices C, D, E, F, and G, bulletins and correspondence with respect to the confusion over representations made as to the availability of "Tillamook Cheese."

These documents show that Brandt notified Certified Grocers that Tillamook sharp daisies and blocks would

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* Foremost Dairies, Inc. v. FTC, 1965 Trade Cases ¶ 71,500, 5 Cir., July 14, 1965.

not be available until January, 1966. Brandt made no statements to Certified with respect to TC&DA (App. G). The trade was informed, pursuant to Certified's bulletin of July 17, 1965 (App. C), that sharp Tillamook daisies and blocks would be out of stock until January, 1966. A representative of TC&DA informed Certified that it had such products available and a correction appeared in Certified's next bulletin dated July 24, 1965 (App. D). In the meantime, and subsequently, TC&DA's counsel sent his minatory letters to Brandt (App. E and F), although he should have known that Brandt might well have made representations only with respect to petitioner's product. That this is all that Brandt did is shown by Certified's letter of September 27, 1965 (App. G).

The foregoing shows that everyone—the public, the marketing organizations, and even the lawyers—are confused, frustrated, and in continual turmoil as a result of the present state of the decisions. The situation cannot help but become increasingly serious now that Foremost Dairy has taken over marketing of "Tillamook Cheese" from respondent.

Only this Court can straighten out a hopeless state of confusion which is growing worse every day.

Respectfully submitted,

J. PIERRE KOLISCH
Attorney for Petitioner

WARREN H. MCMINIMEE
JON M. DICKINSON
Of Counsel

APPENDIX A

Oregon Journal September 3, 1965

TILLAMOOK MARKETING PACT OKd

By William J. Cary, Jr., Journal Business Editor

Tillamook Cheese & Dairy Association, victor earlier this year in a court fight to permit continued use of the Tillamook Cheese name, has signed a five-year agreement with Foremost Dairies, Inc., of San Francisco for marketing Tillamook Premium Brand cheese products.

The court victory was won in April in the U.S. Court of Appeals in San Francisco as part of a continuing legal altercation between Tillamook Cheese & Dairy Association and the Tillamook County Creamery Association.

A DISPUTE arose in 1963 between TC&DA and TCCA over marketing and trademark procedures of each. Suits and countersuits centered on use of the brand names Tillamook and Premium, and distribution of the famed Tillamook County cheese.

The Tillamook name dispute was settled by the Court of Appeals, but an action remains in Multnomah County Circuit Court concerning money which TCCA claims is owed it by TC&DA, primarily for marketing TC&DA products.

The marketing agreement signed Friday, between TC&DA and Foremost will serve to divide the two farmer cooperatives in Tillamook County permanently.

FOREMOST will buy, age and market the entire cheese production of TC&DA and also will buy and market the total cheese production of the Red Clover Creamery Association of Tillamook, an affiliate of TC&DA.

Under a trademark licensing agreement, production from both TC&DA and Red Clover will be marketed under the Tillamook trademark.

APPENDIX B

The Oregon Journal · Friday, September 24, 1965

FOREMOST OFFICIAL SAYS TC&DA's FUTURE BRIGHT

Tillamook Creamery & Dairy Association is now a going concern with money in the bank and a future assured that every pound of cheese it can produce will be marketed.

Such was not the case a month ago, according to O. M. (Orrie) Anwyl of San Francisco, vice president of Foremost Dairies, Inc.

Anwyl's company on Sept. 1 purchased the TC&DA's cheese inventory, which was in excess of 1 million pounds, for about $425,000, thus paying off TC&DA's producers. The purchase also paid off the association's bank notes and gave it money in the bank.

At the same time Foremost signed a five-year contract with two options for five-year extensions. Under the contract Foremost agrees to purchase all Grade A cheese produced by TC&DA.

Foremost accepts the product at the "curing room door," and has leased the curing room section of the TC&DA's big plant in Tillamook.

All the Grade A cheese purchased by Foremost will be marketed on the West Coast under the Tillamook label through a corporate name in which Foremost will do business as Tillamook Cheese Co. Director is Raymond Sidley, Foremost's Portland manager.

Anwyl emphasized, "We have nothing to do with the lawsuits that are pending. We are only serving as the marketing agent.

"Foremost is a strong marketing firm. We can easily market every bit of Tillamook cheese produced in the county." He added that only cheese produced in Tillamook County will be marketed under the Tillamook label.

Anwyl, vice president in charge of administration for the domestic dairy division of Foremost, said he has made a dozen trips to talk with the TC&DA officials since the first of the year.

"Last spring they suggested two ideas, one of which was that we lease the plant. Then the third plan evolved under which they would produce and Foremost would cure and market the production," Anwyl said.

By paying cash to TC&DA, Foremost hopes the association will regain some of the producers it lost and move back up to the 5 million pound annual production it once had. Anticipated production this year will run between 2 and 2½ million pounds.

"It's a shame," said Anwyl, "that the fine modern plant such as they have at Tillamook is not used at nearer capacity, and thus bring costs down and profits up for everybody." He placed the capacity from 6 to 7 million pounds annually, and said it could even go much higher with double shifting and double sets.

He hopes production will grow and thus give him more of the famous Tillamook product which commands a 6 to 8 cent premium in the market place.

APPENDIX C

CERTIFIED GROCERS OF CALIF., LTD.
DELICATESSEN BULLETIN 7/17/65, No. 29

NEW LISTINGS

7063 Tastee Shrimp Cocktail—Big 2—6/2/5½ oz. $4.14
Each case contains 6 sleeves of 2/5½ oz. reversible glasses. This type of packaging gives multiple sales. Cost per each 5½ oz. jar is 34½c each or 70c per sleeve. Each sleeve of 2 jars is beautifully lithographed and has plenty of sales appeal. Tastee is the original "Ready to Eat" Shrimp Cocktail containing choice tender whole shrimp in a delicious tangy sauce.

8607 Springfresh Ind. Wrapped American Slices
12/8 oz. $3.12

8608 Springfresh Ind. Wrapped Pimiento Slices
12/8 oz. $3.12

8609 Springfresh Ind. Wrapped Swiss Slices
12/8 oz. $3.12

Now members are offered a complete line of Springfresh Individually Wrapped Slices—5 oz., 8 oz., 12 oz., and 16 oz. This new 8 oz. size has been requested by members. The low cost of only 26c per 8 oz. package will enable members to feature this new size.

SPECIAL NOTICE ON SPOILS

Items that do not carry an "S" on the deli order form are not eligible for spoils return. Members are requested to call the broker or supplier for spoils credit. If broker or supplier is not known call your Deli Office for phone number.

COMMENTS NOTED BY YOUR DELI DIVISION

There is one thing to be said about ignorance—it sure causes a lot of interesting arguments.

SPECIAL NOTICE ON FARMER JOHN SLICED BACON AND FRANKS

Out of stock conditions have existed on Farmer John Sliced Bacon and Franks. Orders placed with Farmer John have been partially filled thus creating a stortage of product to members. The Deli Division is doing all in its power to keep sufficient stocks on hand. A shortage of pork and high prices is cutting back production on many pork products in other brands, also on canned hams.

SPECIAL NOTICE ON SHARP TILLAMOOK DAISIES

Sharp Tillamook Daisies will be out of stock until January 1966. The last shipment to headquarters will be made this week. 40 lb. Tillamook Sharp Blocks are out of stock until January 1966.

APPENDIX D

CERTIFIED GROCERS OF CALIF., LTD. DELICATESSEN BULLETIN 7/24/65, No. 30

CORRECTION ON TILLAMOOK SHARP DAISIES AND BLOCKS

Last week's bulletin stated that Tillamook Sharp Daisies and Blocks were not available. This was in error. Order your needs under bulk cheese code numbers 56 and 60.

DESCRIPTION AND PACK CHANGE

8785	Frigo Italian Grated Cheese (Formerly Springfresh brand)	12/1½ oz.	$1.88
7569	Farmer John Liverwurst Chub	12/6 oz.	$1.71
7570	Farmer John Liver & Bacon (Formerly packed 16/6 oz.)	12/6 oz.	$1.71

COMMENTS NOTED BY YOUR DELI DIVISION

We are all manufacturers — making good, making trouble, or making excuses.

NEW LISTINGS

8041	Major Sliced Smoked Beef	12/3½ oz.	$3.35
8042	Major Sliced Smoked Ham	12/3 oz.	$3.35
8043	Major Sliced Corned Beef	12/3½ oz.	$3.35
8044	Major Sliced Smoked Turkey	12/3 oz.	$3.90
8045	Major Sliced Smoked Chicken	12/3 oz.	$3.90
8050	Viking Danish Sliced Cooked Ham	12/5 oz.	$5.90

The fantastic new Major & Viking Sliced Meats are here now—a major event! See Bulletin for details.

9519 Jack Frosted Strawberry Pressure Can
12/18 oz. $4.78

An additional flavor to the popular Jack Frosted Chocolate Pressure Can Milk Shake. A real tart strawberry flavor will be a favorite with the kids from 6 to 60. A special introductory allowance of "one free with ten" through Sept. 3, is reflected in the cost. The pressure can is a beautiful strawberry red and will be a real "shopper stopper."

8919 Grand Taste Ol' Virginia Pear Shape Hams
6/5 lb. $22.80 $.76 lb.

8920 Grand Taste Ol' Virginia Pear Shape Hams
6/9 lb. $39.42 $.73 lb.

9134 Grand Taste Ol' Virginia Pear Shape Picnic
6/4¾ lb. $17.10 $.60 lb.

Now available from your Deli Division—Grand Taste Ol' Virginia Brand Canned Hams and Picnics. The only ham and picnic canned in Los Angeles and the quality is unsurpassed. Compare the price—ham is from 3½c to 6c per pound under any offering and the picnic shoulder is up to 5½c per pound under. The Ol' Virginia brand is well known to your customers and is sure to be a repeat sale once your customer tries any of the above listings.

APPENDIX E

July 20, 1965

Mr. Chris Brandt
The Imperial Brokerage Co.
1020 Colorado Street
Los Angeles, California

Re: Interference with Tillamook Cheese & Dairy Association Sales in Los Angeles Area

Dear Mr. Brandt:

We have been advised by our client, Tillamook Cheese & Dairy Association, of Tillamook, Oregon, that you have given to Certified Grocers, of Los Angeles, false information regarding the availability of Tillamook cheese from TC&DA, misleading Certified Grocers into issuing a bulletin which could have no other effect than interfering with TC&DA's sales program in the Los Angeles area. Our specific information is that you informed Certified Grocers that the offices of TC&DA and TCCA are now "the same" and for that reason you are in a position to know that until 1966 neither TC&DA nor TCCA will have available any 40 pound sharp cheese blocks nor 25 pound sharp cheese wheels or daisies. Such information is not true insofar as TC&DA is concerned, and we can only assume that such statements were made by you with the idea of inducing Certified Grocers to issue a bulletin reflecting such information, thus to interfere with the sale of TC&DA's Tillamook cheese.

We know you are aware of the pending conflicts between TC&DA and TCCA and in fact, at the time of handing down of the judgment in the United States District Court on August 6, 1964, we sent a copy of this

judgment to you on September 1, 1964, with a letter of that date, informing you of the injunction so that you would be bound thereby. This judgment specifically prohibited the plaintiff (TCCA), and its officers, agents, servants, employees and those persons in active concert or participation therewith from interfering with TC&DA's sales of its cheese under the "Tillamook" mark. Thus, you have a copy of this injunction and can refer to it.

Under the circumstances, if the information we have received is correct, and you have deliberately given false information to Certified Grocers so as to interfere with the sale of TC&DA's cheese in the Los Angeles area, you are certainly in violation of TC&DA's rights. We intend to take action against you to see that TC&DA's rights are not violated again, that the damage you have so far done is undone to the extent now possible, and that TC&DA is compensated for the damage inflicted on it.

As a first step, it is hereby demanded that you make an immediate retraction *in writing* to Certified Grocers, with a copy to us, informing them, as you well know, that the offices of TC&DA and TCCA are not the same, and further informing Certified Grocers that you are in no position and have no authority whatsoever to speak on behalf of TC&DA in regard to the availability of cheese by TC&DA, or to speak on behalf of TC&DA in any other way.

The severity of our further action against you will depend on the promptness and completeness of your retraction of the misleading statements you have made to Certified Grocers.

Very truly yours,

BUCKHORN, BLORE, KLARQUIST AND SPARKMAN
JOSEPH B. SPARKMAN

APPENDIX F

September 21, 1965

Mr. Chris Brandt
The Imperial Brokerage Co.
1020 Colorado Street
Los Angeles, California

Re: Interference with Tillamook Cheese & Dairy Association Sales in Los Angeles Area

Dear Mr. Brandt:

On July 20, 1965, we wrote you about a matter concerning Tillamook Cheese & Dairy Association, of Tillamook, Oregon, and sent the letter to you by certified mail. On or about August 10, 1965, the letter was returned to us indicating that it had been refused delivery. A copy of that letter is enclosed herewith so you will know the reason for our complaint.

Your refusal to accept a registered letter from us in connection with this matter could be serious particularly in view of the fact that you are bound by the injunction in this case (because of our sending a copy of the injunction to you in accordance with the Federal Rules of Civil Procedure). We suggest you consult your attorneys in connection with this matter.

Very truly yours,

BUCKHORN, BLORE, KLARQUIST AND SPARKMAN
JOSEPH B. SPARKMAN

APPENDIX G

CERTIFIED GROCERS OF CALIFORNIA, Ltd.
Retailer-Owned Food Distributors
2601 South Eastern Avenue
Los Angeles 22, California

September 27, 1965

Mr. Chris Brandt
Imperial Brokerage Company, Inc.
1020 Colorado Blvd.
Los Angeles, California

Dear Mr. Brandt:

In reference to your question—"Did you ever make a statement to Certified Grocers that the offices of TC&DA and TCCA are now the same?"—the answer is a definite, no! You gave us information that Tillamook Sharp Daisies and Blocks were not available—period. You made no mention of TC&DA in this respect and Certified's Deli Bulletin made no such reference.

The following week a representative called on me and brought to my attention the fact that TC&DA had product available. The very next bulletin, one week after this out of stock notice, a correction was made and no mention of TC&DA or TCCA was made in this bulletin or any bulletin mailed out to our members.

To our knowledge, Chris, at no time have you ever given any misinformation to Certified in regards to Tillamook Cheese.

Copies of Certified bulletins attached.

Sincerely,

ROBERT E. KEARNEY, Delicatessen Products Division